



September 12, 2002

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2002-5119

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168517.

The Texas Education Agency (the "agency") received a request for information regarding the Rio Grande Defensive Driving School. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

You explain that the agency received the requestor's request on June 20, 2002. On June 26, 2002, the agency asked the requestor to clarify his request. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). Thus, the ten-business-day time period to request a decision under section 552.301(b) was tolled on June 26, 2002. *See* Gov't Code § 552.301(b); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). The agency received the requestor's clarification on July 1, 2002; consequently, the ten-business-day period resumed on July 2. We note that July 4, 2002 was a national holiday. Thus, the ten-business-day period resumed again on July 5, 2002. You submitted your request for a decision from this office on July 10, 2002; accordingly, we conclude that you timely requested a decision from this office pursuant to section 552.301 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies. It also protects the identities of individuals who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 2 (1981), citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988)*. Furthermore, as its purpose is to protect the flow of information to the governmental body, rather than to protect the interests of the person who furnishes the information, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See Open Records Decision Nos. 630 at 4 (1994), 549 at 6 (1990)*.

You state that the complaints at issue involve violations of article 4413(29c) of Vernon's Texas Civil Statutes. Section 27 of article 4413(29c) provides that a violation of article 4413(29c) can result in both civil and criminal penalties. It appears that the individual whose identity you seek to withhold in Exhibit 3 contacted the agency and reported actions that could result in both civil and criminal penalties. We note, however, that the requestor has informed this office that he already knows the identity of the complainant whose identity you seek to withhold from Exhibit 3. Thus, Exhibit 3 must be released in its entirety.

With respect to Exhibit 4, we note that this document does not contain any information to indicate that the individual whose identity you seek to withhold reported alleged violations of the law to the agency. Therefore, we are unable to conclude that the agency may withhold the highlighted information in Exhibit 4 under section 552.101 in conjunction with the informer's privilege.

We further note that the individuals whose identities you seek to withhold in Exhibit 2 appear to be either witnesses or victims of conduct that was reported by another individual whose identity you do not seek to withhold. These individuals did not report alleged violations to the agency. Rather, the agency contacted these individuals to obtain statements regarding the alleged violations reported by another individual. Thus, we are unable to conclude that the agency may withhold any information in Exhibit 2 under section 552.101 in conjunction with the informer's privilege.

Section 552.101 also incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d

668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

We agree that Exhibit 2 contains intimate or embarrassing information. This office's normal practice in redacting information subject to the common-law right to privacy is to redact all references to the intimate or embarrassing information. However, this office was unable to follow our normal practice in this instance because you have revealed such information in your comments, which you copied to the requestor. Thus, we must withhold the identities of those persons to whom the intimate or embarrassing information pertains in order to protect their privacy. In this instance, we conclude that there is no legitimate public interest in the identities of these individuals. *See id.*; *see also* Open Records Decision Nos. 422 (1984), 396 (1983). Accordingly, we have marked the information in Exhibit 2 that the agency must withhold in order to protect the identities of those individuals.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision 615 at 4-5 (1993). Upon review of your arguments and the submitted information, we agree that a portion of the information in Exhibit 5, which we have marked, may be withheld under section 552.111. We are unable to conclude, however, that any of the remaining information in Exhibit 5 reflects the agency's policymaking processes.

To summarize, (1) we have marked the information in Exhibit 2 that must be withheld under section 552.101 of the Government Code and common-law privacy; and (2) we have marked the information in Exhibit 5 that may be withheld under section 552.111 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen A. Eckerle". The signature is fluid and cursive, with the first name "Karen" being more prominent than the last name "Eckerle".

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 168517

Enc: Submitted documents

c: Mr. Michael B. Wansey
Rio Grande Defensive Driving School
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McAllen, Texas 78504
(w/o enclosures)